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Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Term, 19

DOROTHEA HUNTER,

Petitioner

vs.

CARBONDALE AREA SCHOOL DISTRICT AND NORTHEASTERN EDUCATION INTERMEDIATE UNIT NO. 19 (N.E.I.U. NO. 19),

Respondent

BRIEF OF RESPONDENT, N.E.I.U. NO. 19 IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. Whether a conflict exists among the United States Courts of Appeals with regard to the appropriate level of constitutional protection to be provided by an education intermediate unit to a public school child, in particular, Petitioner's decedent, where the alleged harm suffered by him was caused by private actors and which occurred after-school hours and off school property?

Suggested answer: in the negative.

2. Whether the Courts below, pursuant to this Honorable Court's Decision in *DeShaney, infra,* properly held that Petitioner failed to state a cause of action against Respondent NEIU?

Suggested answer: in the affirmative.

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PARTIES TO THE PROCEEDINGS BELOW

In the United States District Court for the Middle District of Pennsylvania, the Plaintiffs were Dorothea Hunter, Administratrix of the Estate of David B. Hadden, deceased, and Dorothea Hunter, in her own right. The two Defendants were Carbondale Area School District and the Northeastern Education Intermediate Unit #19 (NEIU #19). In the Court of Appeals for the Third Circuit, the Appellant was "Dorothea Hunter, Administratrix of the Estate of David B. Hadden, deceased, and in her own right." The two Appellees were Carbondale Area School District and the Northeastern Education Intermediate Unit #19 (NEIU #19).

It is noted that in the instant Petition for Writ of Certiorari, Petitioner is identified only as "Dorothea Hunter."

REFERENCE TO THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Opinion of the United States District Court for the Middle District of Pennsylvania (Conaboy, J.) is not officially reported but is attached to the Petition for Writ of Certiorari at Appendix pages 1a-17a.

The Opinion of the United States Court of Appeals for the Third Circuit (Panel) is not officially reported but is attached to the Petition for Writ of Certiorari at pages 18a-20a. That Court's Opinion of August 19, 1993, which denies Petitioner's Petition for Rehearing is not officially reported but is attached to the Petition for Writ of Certiorari at pages 21a-22a.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdiction over this action pursuant to 28 U.S.C. §1254(1), as a Petition for a Writ of Certiorari from a Judgment of a United States Court of Appeals and from an Order denying the rehearing of this matter, which Order was dated August 19, 1993.

STATUTE INVOLVED IN THIS CASE

The only statute identified by Petitioner in the Petition for Writ of Certiorari is 42 U.S.C. §1983, which provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

COUNTERSTATEMENT OF THE CASE

Petitioner, Dorothea Hunter, Administratrix of the Estate of David B. Hadden, deceased, and in her own right, brought this action against Respondents, Carbondale School District and the Northeastern Education Intermediate Unit #19 (NEIU #19) as a result of the drowning death of her minor decedent on November 16, 1989.

According to the Amended Complaint, the Decedent, David Hadden, was a special education student in the seventh grade at Carbondale Area Junior/Senior High School, Carbondale, Lackawanna County, Pennsylvania. It was alleged that on November 16, 1989, David Hadden was disciplined for fighting with another student on the previous day, November 15, 1989, by being placed in detention after school, along with several mainstream (non-exceptional) students. Petitioner alleged that during detention, an altercation between David and the other boys occurred, and that after the boys were released from detention, David Hadden was chased by these students in the school building for several minutes, but that this ended when David got away from the boys. Subsequently, four boys spotted David outside, chased him off school grounds, across State Route 6, and into an embankment along a creek. At that point, David Hadden was either forced into the creek by the boys or he fell into the creek, where he ultimately drowned.

Petitioner alleged that the conduct of the two Respondents in placing David Hadden in this detention room violated David Hadden's civil rights under 42 U.S.C. §1983, his Eighth and Fourteenth Amendment rights under the United States Constitution, as well as various rights under the Pennsylvania Constitution and other federal and state enactments.

The claims against the NEIU are based on the alleged duty of the NEIU to protect the life, liberty, and property of public school students from constitutional deprivations by *private* actors who were fellow students of the minor decedent. There is no disagreement that the harm suffered by David Hadden was caused by these fellow students, who were *private* actors, and that the injury to the minor decedent occurred *off* school property and *after* school hours. There are no allegations, nor can any inference be drawn from the Amended Complaint supporting allegations, that the NEIU or any of its agents participated in, condoned, or had any knowledge of the harm allegedly being inflicted upon the minor decedent by his fellow students after school hours on the day in question.

Further, there were no allegations in the Amended Complaint that any agent, servant, or employee of the NEIU witnessed or was present for the after-school incident or saw any actions by the boys which gave rise to the minor decedent's death. Petitioner did not allege, nor could she, that any agent or employee of the NEIU had knowledge of or condoned the actions of these private individuals who chased and taunted the minor decedent, nor that such actions had ever taken place before.

Based on the fact that the Amended Complaint failed to establish any special relationship between the NEIU and the Petitioner sufficient to give rise to due process protections under this Court's Decision in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998 (1989) and the fact that the Amended Complaint failed to state a cause of action against the NEIU on a state-created danger theory, the District Court properly granted the Respondents' Motions to Dismiss and the Court of Appeals properly affirmed this Decision.

SUMMARY OF ARGUMENT

Petitioner incorrectly asserts that there is a conflict among the Courts of Appeals with regard to the constitutional protections afforded a public school student from harm inflicted on him by fellow students, off school property and after school hours.

There is no such conflict. The controlling law, which was enunciated just four years ago by this Honorable Court, is set forth in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998 (1989). The Court of Appeals for the Third Circuit properly applied these principles in the instant case.

In addition, there is no valid reason for this Honorable Court to grant a Writ of Certiorari, inasmuch as the District Court properly granted the NEIU's Motion to Dismiss. The Petitioner failed to set forth a claim that a special relationship existed between the NEIU and the Petitioner's decedent which would give rise to due process protection. The NEIU's authority over the Petitioner's decedent was not a limitation "imposed on his freedom to act on his own behalf" and, accordingly, a special relationship did not exist.

Further, the Amended Complaint failed to assert a sufficient basis to maintain that the NEIU created a "state-created danger" which resulted in the harm which befell the Petitioner's decedent.

Therefore, the District Court properly granted the Motion to Dismiss and the Court of Appeals for the Third Circuit properly affirmed that judgment. For these reasons, a Writ of Certiorari should be denied.

ARGUMENT I

There Is No Conflict Among The Courts Of Appeals In The Application Of The Constitutional Protections Afforded A School Student Who Suffered Harm After School Hours And Off School Property At The Hands Of Private Individuals

In the opening paragraph of her argument, Petitioner incorrectly presents the question involved in this action as being "whether the physical or sexual abuse and molestation of school children rises to the level of a constitutional deprivation which is subject to protection pursuant to 42 U.S.C. §1983." (Petitioner's Brief, page 17) It is submitted that Petitioner is attempting to raise interest in this case by comparing this case to those involving the sexual abuse of school children. However, this case does not involve the molestation of school children. Rather, this case involves the issue of whether Petitioner's Amended Complaint stated a viable constitutional claim against the NEIU and the other Respondent, Carbondale Area School District, for the harm suffered by Petitioner's decedent at the hands of private individuals (other students) whose actions took place off school property and after school was dismissed for the day.

In her brief, Petitioner erroneously asserts that there is disagreement among the Courts of Appeals on the issue involved in the instant case. In an effort to establish this "conflict", she cites several cases, all of which are distinguishable from the facts of the instant case.

Doe v. Taylor Independent School Dist., 975 F.2d 137 (5th Cir. 1992), *cert. den.* 113 S.Ct. 1066, 122 L.Ed. 2d. 371,

reargument en banc ordered, 987 F.2d 231 (5th Cir. 1993), involved a public high school teacher/coach who was engaged in a one and one-half year course of seduction and repeated sexual molestation of a fourteen-year-old high school student, during school hours, coaching activities and during after-school hours. This behavior occurred on and off school property. There was evidence that the school principal and other school authorities knew of this behavior or failed to fully investigate numerous complaints of allegations of this teacher's actions.

The Petitioner correctly noted that in *Doe*, the Court of Appeals for the Fifth Circuit stated that "... public school officials have a duty to police the misconduct of their subordinates and to protect school children from the hazards of which the school officials *know* or *should know*. Their *deliberate indifference* to these duties can form the basis of liability against them." *Id.* at 147. (Emphasis added.)

The instant case differs from *Doe* in that Petitioner's Amended Complaint does not allege or give rise to an inference that the NEIU knew of the action of the four boys in chasing and taunting David Hadden or that a hazard existed from which David Hadden was owed protection. Moreover, there was no assertion made in the Amended Complaint that any prior acts had been committed by these four boys toward David Hadden to which the NEIU exhibited deliberate indifference. *Cf. D.T. by M.T. v. Independent School District No. 16,* 894 F.2d 1176, 1189 (10th Cir. 1990), citing *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998 (1989).

Likewise, *Lopez v. Houston Independent School District,* 817 F.2d 351 (5th Cir. 1987) and *Jane Doe "A" v. Special School District of St. Louis County,* 901 F.2d 642 (8th Cir. 1990), cited

by Petitioner, are not factually similar to the instant case as these cases involved the actions of school bus drivers who were subject to the supervision of school officials.

NEIU notes that Petitioner misstates the Court of Appeals for the Seventh Circuit's holding in *J.O. and P.O. v. Alton Community School District No. 11,* 909 F.2d 267 (7th Cir. 1990) in her Brief. There, the Court did not hold generally that sexual molestation of school children was not actionable under §1983. Rather, that Court found that under the specific facts of the case, the Plaintiffs had failed to state a viable claim for deprivation of a constitutionally protected liberty interest on the basis of a special relationship between the school defendants and the minor children, citing *DeShaney supra, Stoneking v. Bradford Area School District,* 882 F.2d 720, 730 (3rd Cir. 1989), *cert. den.*, 493 U.S. 1044, 110 S.Ct. 840, 107 L.Ed.2d 835 (1990); *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed. 2d 28 (1982); *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed. 2d 251 (1976).

None of the cases cited by the Petitioner is at odds with this Honorable Court's holding in *DeShaney,* which is controlling in the instant case. The Court of Appeals for the Third Circuit properly applied the sound principles outlined in *DeShaney* and affirmed the District Court's Order granting the dismissal of this action.

ARGUMENT II

A. The Courts Below Properly Held That The Petitioner Failed To Establish That Any Type Of Special Relationship Existed Between The NEIU And The Petitioner, Sufficient To Give Rise To Due Process Protections, Pursuant To The *DeShaney* Decision

The due process clause is a limitation on the state's power to act, not a guarantee of certain minimal levels of safety and security. *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 195, 109 S.Ct. 998, 1003 (1989). Although it forbids the state itself from depriving individuals from life, liberty, or property without due process of law, its language cannot fairly be extended to impose affirmative obligations on the state to ensure that those interests do not come to harm through other means, such as private actors. *Id.*

In *DeShaney*, this Honorable Court found that there was no constitutional liability on a state's behalf for releasing a child into the custody of a parent who ultimately abused and injured the child, even though the state agency was aware of the parent's history of abusive behavior. This Court held that because the due process clause does not confer an affirmative right to governmental aid, the state cannot be held constitutionally liable for injuries that could have been averted had it provided assistance. In certain limited cases, the Constitution *does* impose upon the state affirmative duties of care and protection with respect to particular individuals, such as providing adequate medical care to incarcerated persons, *Estelle v. Gamble,* 429 U.S. 97, 97 S.Ct. 285 (1976), and providing involuntarily committed mental patients with services neces-

sary to ensure reasonable safety from themselves and others, *Youngberg v. Romeo,* 457 U.S. 307, 102 S.Ct. 2452 (1982). However, absent the existence of such a special relationship, the state does not have a duty to protect the life, liberty, or property of a citizen from deprivations by private actors. *DeShaney,* 489 U.S. at 107, 109 S.Ct. at 1005.

Therefore, "deprivation of liberty", triggering due process protection, arises from the state's affirmative act of restraining the individual's freedom to act on his own behalf (through incarceration, institutionalization, or a similar restraint of personal liberty), not from its failure to act to protect liberty interests against harms inflicted by other means. *Id.* at 200, 109 S.Ct. at 1006. *See also Collins v. City of Harker Heights,* U.S. , 112 S.Ct. 1061 (1992).

Petitioner asserts that her decedent was required to attend school and thus, the NEIU had an affirmative duty of care toward him. However, compulsory school attendance laws cannot be equated with incarceration or involuntary commitment. This specific issue was addressed in *J.O. and P.O. v. Alton Community Unit School District No. 11,* 909 F.2d 267 (7th Cir. 1990), where the Court of Appeals for the Seventh Circuit refused to recognize an affirmative duty resulting from compulsory attendance laws. There, the Court noted that parents still retained primary responsibility for feeding, clothing, sheltering, and caring for the child, and that the state does not assume responsibility for the personal lives of the students by requiring their attendance at school because the children and their parents retain substantial freedom to act. *See also Doe v. Douglas County School District,* 770 F. Supp. 591 (D.Col. 1991) (student allegedly abused by school psychologist).

Argument

In the instant case, Petitioner contended that under existing federal and state statutes, a special relationship existed between the parties. Specifically, she argued that the NEIU had a special relationship with her by virtue of the fact that the decedent was placed in a special education course at Carbondale Area Junior/Senior High School as required by federal and state law and that the state entered into a special relationship when it restrained the decedent's freedom to act by placing him in detention after school.

In dismissing these claims, the District Court properly relied on this Honorable Court's Decision in *DeShaney, supra,* as well as the Court of Appeals for the Third Circuit's Decision in *D.R. by L.R. v. Middle Bucks Area Vocational/Technical School,* 972 F.2d 1364 (3rd Cir. 1992), *cert. denied* U.S. , 113 S.Ct. 1045, 122 L.Ed. 2d 354 (1993).

In *D.R.,* the Plaintiffs were two female students in a graphics art class at a vocational/technical school. It was alleged that during the course of the school year several male students had sexually abused them in the classroom, 2-4 times per week, from January to May of 1990. Additionally, a student teacher who was also a Defendant in the action either heard or should have heard the incidents taking place.

After noting the appropriate standard of review for a Motion to Dismiss, the Court of Appeals for the Third Circuit followed this Honorable Court's Decision in *DeShaney, supra,* and declined to impose any constitutional duty upon a school district to protect students from misconduct by other student Defendants.

In the instant case, the District Court noted that the "issues decided in D.R. ... were nearly identical to those in the present case." (Petition for Writ of Certiorari, Appendix at Page 9a)

The NEIU agrees, and further points out to this Honorable Court that several factual distinctions between the cases make the instant one a far stronger and clearer one than *D.R., supra.*

The *D.R.* case pertained to a series of assaults on a student/plaintiff by other students *on* school premises and *during* school hours. These are important factual distinctions from the instant case where the juveniles who chased, taunted, and abused David Hadden did so *off* school premises and *after* school hours. Further, in *D.R.*, a student teacher was allegedly aware of this abusive situation. However, in the instant case, there are no allegations, nor can there be any inference from the Amended Complaint supporting allegations, that the NEIU or any of its agents had any knowledge of the harm being inflicted upon David Hadden by his fellow students on the day in question. Additionally, there is no documentation of any prior abusive behavior toward David Hadden.

Accordingly, the District Court properly relied on *DeShaney* and *D.R.* and declined to impose any constitutional duty upon the NEIU to protect David Hadden from misconduct by students who taunted him after school hours and off school premises.

It is also important to note that in reaching its Decision the District Court emphasized that parents remain the primary caretakers of students, despite the fact that students are required by law to attend class every day. *See* 28 Pa. Stat. Ann. Title 24, §13-1301 (1992). Quoting from the Court of Appeals in *D.R.*, the Court noted that:

> "The school Defendants' authority over DR during the school day could not be said to create the type of physical custody necessary to bring it within the special relationship noted in DeShaney, particularly when their

channels for outside communication were not totally closed."

D.R. at 20.

Parents are and remain the primary caretakers of students, even though state laws require the students' presence in school. The District Court noted that "... it was the decedent's mother who decided where the education of the Decedent [David Hadden] would take place. [She] had the option of a private or public education[,]" (Petition for Writ of Certiorari, Appendix at page 10a) for him and had even more control over his precise educational program due to the fact that he was a special education student. Indeed, the decedent's mother had approved the independent education plan developed for David Hadden. Significantly, when invited to do so, she did not desire to participate in a program planning meeting that was used to complete this independent education program.[1]

The District Court further noted that there was no evidence that David Hadden was forced or intimidated by the NEIU to report for detention on the afternoon in question, and that he could have *decided* not to report to detention that day. The NEIU's authority over David Hadden during the school day cannot be characterized as a limitation "imposed

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[1] Although the Defendants in the District Court filed Motions to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), both parties submitted supplemental materials with their briefs. The District Court granted the Motions to Dismiss and it appears that the Court did not consider the supplemental materials, thereby *not* construing the Motions as ones for Summary Judgment. This supplemental material was mentioned in the District Court's Opinion, however.

Significantly, the Court of Appeals affirmed the Order granting the Motion to Dismiss and further noted that in the event that the District Court *did* consider the extraneous materials, thereby construing the Motions as ones for Summary Judgment, the Court of Appeals also affirmed that Decision.

on his freedom to act on his own behalf," creating the type of physical custody necessary to bring it within the special relationship that this Court outlined in *DeShaney, id.* at , 109 S.Ct. at 1006. *See also Black v. Stephens,* 662 F.2d 181 (3rd Cir. 1981), *cert. denied,* 455 U.S. 1008 (1982).

B. The Courts Below Properly Held That The Amended Complaint Failed To State A Cause Of Action Against The NEIU On A "State-Created Danger" Theory

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Petitioner also asserted that the NEIU is liable because it placed David Hadden in an environment with other students who were a danger to him, thereby violating his constitutional rights under the Fourteenth Amendment pursuant to 42 U.S.C. §1983. It was asserted that David Hadden was placed in peril when he was put in the detention room with other students who were not special education students but were older and more physically developed than Hadden and who were alleged to have had "a lengthy history of animosity toward and abuse of David Hadden."

In Petitioner's argument, she states that the question involved is:

> "... whether under the circumstances which led to the death of Petitioner's decedent, public school authorities have a duty to protect and preserve public school children's liberty interests to be free from unwarranted assault, particularly where the actions of school authorities, ... put the decedent in a position of state-created danger which led directly to his death."

Petitioner's Brief, page 20.

First, the statement above is a misstatement of the facts of the case. There is absolutely no allegation that the NEIU or a NEIU employee acted to put the decedent in a position of state-created danger. At most, it is alleged that David Hadden was placed in an after school detention. It was *after* his release from his detention that he was chased by the four boys. While he was walking home from school, *after school hours*, and *off school property*, these four boys acting on their own and without any school authority (private actions) taunted and chased him across a state highway and down an embankment and ultimately into the creek where he drowned. It is clear that the Respondent *did not* place the decedent in "a position of state-created danger which led directly to his death."

The "state-created danger" theory, which has been utilized to find a constitutional tort duty under §1983 outside a strict custodial setting, applies in limited circumstances. In determining whether Respondents were liable under this theory, the District Court properly applied the test of "whether the state actors involved affirmatively acted to create Plaintiff's danger, or to render him or her more vulnerable to it. See D.R. (citing Bryson v. City of Edmond, 905 F.2d 1386, 1392 (10th Cir. 1990))." (Petition for Writ of Certiorari, Appendix at page 13a)

In *D.R.*, the Court of Appeals stated that in order to utilize the "state-created danger" theory, a Plaintiff must supply the Court with evidence that the state acted to *create* the danger that the third party produced against the Plaintiff, thereby triggering a viable constitutional duty to assist the Plaintiff's access to the civil courts.

In the instant case, there is nothing to indicate that the NEIU encouraged, facilitated, or authorized the students to pursue, taunt, or threaten David Hadden. Nor is there any

allegation that the NEIU in any way even knew of the occurrence of this behavior. There is no history of abusive behavior toward David Hadden except for the altercation which had occurred on November 15, 1989, which led to David Hadden's detention the following day. Further, there is no allegation that either David Hadden or his mother ever complained of any harassment David allegedly underwent while he was in school or going to or coming from school. His mother signed her approval of David's Individualized Education Program developed for him and she twice indicated that she did not desire to participate in a program planning meeting in regard to his individualized education program. This IEP also indicated that David walked to school. (*See* footnote 1.)

Just as in *DeShaney* and *D.R.*, there is no evidence here indicating that the NEIU created a situation which placed David Hadden at peril, added to a risk of harm to him, or that it acted in a way to render him more vulnerable to the alleged conduct of the students who harassed and abused him. This was an "unwarranted assault" against the decedent which was "perpetuated [sic] by private individuals off school property and after school was over for the day." (*See* District Court Opinion, Petition for Writ of Certiorari, Appendix at page 14a).

In short, Respondent failed to establish that the NEIU violated a constitutional duty owed to her by creating a danger to David Hadden. This claim was correctly dismissed by the District Court which judgment was properly affirmed by the Court of Appeals.

CONCLUSION

For the reasons set forth herein, the instant Petition for Writ of Certiorari should be denied.

Respectfully submitted,
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